

Office of the Secretary of Defense

§ 292.3

profiles, “high” and “low.” The “high” profile permits withholding of a document which, if released, would allow circumvention of an agency rule, policy, or statute, thereby impeding the agency in the conduct of its mission. The “low” profile permits withholding if there is no public interest in the document, and it would be an administrative burden to process the request.

(b)(3) Applies to information specifically exempted by a statute establishing particular criteria for withholding. The language of the statute must clearly state that the information will not be disclosed.

(b)(4) Applies to information such as trade secrets and commercial or financial information obtained from a company on a privileged or confidential basis which, if released, would result in competitive harm to the company.

(b)(5) Applies to inter- and intra-agency memoranda which are deliberative in nature; this exemption is appropriate for internal documents which are part of the decision making process, and contain subjective evaluations, opinions and recommendations.

(b)(6) Applies to information release of which could reasonably be expected to constitute a clearly unwarranted invasion of the personal privacy of individuals; and

(b)(7) Applies to records or information compiled for law enforcement purposes that (A) could reasonably be expected to interfere with law enforcement proceedings, (B) would deprive a person of a right to a fair trial or impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of the personal privacy of others, (D) disclose the identity of a confidential source, (E) disclose investigative techniques and procedures, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

(b)(8) Permits the withholding of matters contained in, or related to, examination, operating or conditions reports prepared by, on behalf of, or for the use of, an agency responsible for the regulation and supervision of financial institutions.

(b)(9) Permits the withholding of geological information and data including maps, concerning wells.

PART 292—DEFENSE INTELLIGENCE AGENCY (DIA) FREEDOM OF INFORMATION ACT

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APPENDIX A TO PART 292—UNIFORM AGENCY FEES FOR SEARCH AND DUPLICATION UNDER THE FREEDOM OF INFORMATION ACT (AS AMENDED)

AUTHORITY: 5 U.S.C. 552.

SOURCE: 57 FR 38775, Aug. 27, 1992, unless otherwise noted.

§ 292.1 Purpose.

This document implements the “Freedom of Information Act (FOIA),” 5 U.S.C., as amended, with the Defense Intelligence Agency (DIA) and outlines policy governing release of records to the public.

§ 292.2 Applicability.

This part applies to all DIA elements, and governs the public release of records of these elements.

§ 292.3 Basic policy.

(a) Upon receipt of a written request, the DIA will release to the public, records concerning its operations and activities which are rightfully public information. Generally, information, other than that exempt in § 292.6, will be provided to the public. The following policy will be followed in the conduct of this program.

(1) The provisions of the FOIA, as implemented by 32 CFR part 286 and this part, will be supported in both letter and spirit.

(2) Requested records will be withheld only when a significant and legitimate governmental purpose is served by withholding them. Records which require protection against unauthorized release in the interest of the national defense or foreign relations of the United States will not be provided.

(3) Official requests from Members of Congress, acting in their official capacity, will be governed by DoD Directive 5400.4,¹ (see DoD 5400.7–R,² paragraph 5–103); from the General Accounting Office by DoD Directive 7650.1;³ and from private parties, and officials of state or

¹Copies may be obtained at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

²See footnote 1 to § 292.3(a)(3).

³See footnote 1 to § 292.3(a)(3).

local governments by DoD 5400.7-R, paragraphs 5-101 and 102.

(4) Records will not be withheld solely because their release might result in criticism of the Department of Defense or this Agency.

(5) The applicability of the FOIA depends on the existence of an “identifiable record” (5 U.S.C. 552(a)(3)). Accordingly, if the DIA has no record containing information requested by a member of the public, it is under no obligation to compile information to create or obtain such a record.

(6) The mission of the DIA does not encompass regulatory or decision-making matters in the sense of a public use agency; therefore, extensive reading room material for the general public is not available.

(7) Pursuant to 5 U.S.C. 552 (a)(4)(A) fees may apply with regard to services rendered the public under the Freedom of Information Act (See appendix A to this part). With regard to fees, the specific guidance of DoD, as set forth in DoD 5400.7-R will be followed.

(b) This basic policy is subject to the exemptions recognized in 5 U.S.C. 552 (b) and discussed in section 292.6.

§ 292.4 Specific policy.

(a) *Definition of a Record.* The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, made or received by the DIA in connection with the transaction of public business and in the DIA’s possession and control at the time the FOIA request is made.

(b) The following are not included within the definition of the word “record:”

(1) Objects or articles, such as structures, furniture, paintings, sculptures, three-dimensional models, vehicles and equipment, whatever their historical value or value as evidence.

(2) Administrative tools by which records are created, stored, and retrieved, if not created or used as sources of information about organizations, policies, functions, decisions, or procedures of a DoD Component. Normally, computer software, including source code, object code, and listings of source and object codes, regardless of

medium are not agency records. (This does not include the underlying data which is processed and produced by such software and which may in some instances be stored with the software.) Exceptions to this position are outlined in paragraph (b)(2)(i) of this section.

(i) In some instances, computer software may have to be treated as an agency record and processed under the FOIA. These situations are rare, and shall be treated on a case-by-case basis. Examples of when computer software may have to be treated as an agency record are:

(A) When the data are embedded within the software and cannot be extracted without the software. In this situation, both the data and the software must be reviewed for release or denial under the FOIA.

(B) When the software itself reveals information about organizations, policies, functions, decisions, or procedures of the Agency, such as computer models used to forecast budget outlays, calculate system costs, or optimization models on travel costs.

(3) Anything that is not a tangible or documentary record, such as an individual’s memory or oral communication.

(4) Personal notes of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use.

(5) Information stored within a computer for which there is no existing computer program or printout for retrieval of the requested information.

(c) The prior application of FOR OFFICIAL USE ONLY (FOUO) markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it will be evaluated to determine whether, under current circumstances, FOIA exemptions apply and whether a significant and legitimate Governmental purpose is served by withholding the record or portions of it.

(d) A record must exist and be in the possession or control of the DIA at the time of the request to be considered